IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs November 20, 2008

STATE OF TENNESSEE v. EDITH LAMONNE BODHAINE

Direct Appeal from the Criminal Court for Davidson County
No. 2005-C-1936 Mark J. Fishburn, Judge

No. M2007-00234-CCA-R3-CD - Filed June 23, 2009

The appellant, Edith Lamonne Bodhaine, was convicted by a jury of driving under the influence (DUI), and she received a sentence of eleven months and twenty-nine days. On appeal, the appellant argues that the trial court erred by not granting her motion for judgment of acquittal at the close of the State's proof and compounded the error by failing to overturn the verdict when acting as thirteenth juror. Upon our review of the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID H. WELLES and JOHN EVERETT WILLIAMS, JJ., joined.

Robert. T. Vaughn, Nashville, Tennessee, for the appellant, Edith Lamonne Bodhaine.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Senior Counsel; Victor S. Johnson, III, District Attorney General; and Matthew Pietsch, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

At trial, Officer Joel Rowney of the Metropolitan Nashville Police Department testified that on September 25, 2004, he was on Interstate 40 East when he observed the appellant's vehicle traveling 80 miles per hour (m.p.h.) in a 55 m.p.h. zone.[1] He turned on his blue lights to effectuate a traffic stop.

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[1] Because no transcript of the trial was available, a statement of the evidence was prepared and submitted to this court pursuant to Rule 24(c) of the Tennessee Rules of Appellate Procedure.

After the appellant pulled over, Officer Rowney approached the vehicle and spoke with the appellant. He observed the appellant fumbling with her license and noticed that she smelled of alcohol. Additionally, Officer Rowney observed an open 12 ounce beer on the floor in the back of the appellant's vehicle. The appellant told Officer Rowney that she was drinking the beer when she was stopped. The appellant also admitted that she drank one beer with dinner. She said that she ate at a Chinese restaurant and that she consumed four plates of food.

Officer Rowney testified that the appellant had to brace herself on the door to get out of her vehicle and then had to lean against the vehicle to gain her balance. Officer Rowney said that he had the appellant perform field sobriety tests to gauge her level of impairment. The appellant did not advise Officer Rowney of any physical problems. Additionally, Officer Rowney recalled that the appellant was wearing tennis shoes during the tests.

Officer Rowney said that during the initial test, the "walk and turn" test, the appellant "lost her balance off the line, missed her heel-to-toe in both directions, and raised her arms." During the second test, the"one leg stand," the appellant swayed, raised her arms, and placed her foot down, all signs of impairment.

Officer Rowney testified that after the appellant failed the field sobriety tests, he advised her of her Miranda rights and read to her the information on the implied consent form. The appellant said that she did not understand, and Officer Rowney read the form a second time. The appellant stated repeatedly that "she was not going to take any test." Officer Rowney opined that the appellant was under the influence. Officer Rowney testified that the appellant asked to see his supervisor, and he called Sergeant Emerson Bogusky to the scene.

On cross-examination, Officer Rowney stated that the appellant was in a low-riding vehicle, a Chevrolet Camaro, and that his arrest report reflected the vehicle was brown. Officer Rowney said that if he testified at the preliminary hearing that the vehicle was white, he may not have recalled the correct color at that time. Officer Rowney acknowledged that the appellant was stopped only for speeding not because she was driving erratically. Officer Rowney stated that the appellant's eyes did not indicate that she was intoxicated, and her mental state was not impaired. Additionally, his notations on the arrest report reflected that her clothing and actions were not unusual. He had also noted that the effects of the intoxicant were slight and that the appellant's speech was loud but not slurred.

Officer Rowney testified that the field sobriety tests were conducted in front of the appellant's vehicle. His police vehicle was behind her car. Upon questioning regarding the lighting in the area of the field sobriety tests, Officer Rowney said that there were no lights on the interstate. Officer Rowney said that the appellant turned off her car to exit the vehicle, but he could not recall if she left her headlights on. Officer Rowney stated that his headlights and spotlights were on while the appellant performed the field sobriety tests and that lighting was adequate. Officer Rowney did not recall testifying at the preliminary hearing that his headlights and front strobe lights were off at the time of the tests.

Sergeant Emerson Bogusky testified that he had been with the Metropolitan Police Department for twenty-eight years. He stated that he went to the scene in response to the appellant's request to see Officer Rowney's supervisor. He said that the appellant was under arrest and in the patrol car when he arrived at the scene. The appellant protested Officer Rowney's decision to arrest her, saying that she was a truck driver, that she was well aware of the law, and that she possessed a commercial driver's license. The appellant told Sergeant Bogusky that she had drunk a beer. He said that her speech was "somewhat slurred" and that she asked the same questions repeatedly despite his numerous responses to the questions. Sergeant Bogusky stated that there was a moderate odor of alcohol from the appellant that was "easily detectable but not overwhelming." Sergeant Bogusky said that the appellant was obviously impaired. Sergeant Bogusky could not recall whether the appellant's headlights were on when he arrived, and he did not recall having a conversation with Officer Rowney about turning off the appellant's headlights.

The defense's sole witness was the appellant's nineteen-year-old daughter, Hailey Bodhaine.[2] Hailey said that after school on September 24, 2004, she met her mother for dinner. The appellant drank a Bud Lite beer with her dinner. Hailey said that the appellant did not drink the entire beer, and she also had water with her dinner. Hailey stated that the appellant ate about three plates of food at the restaurant. They left the restaurant at approximately 7:15 p.m. to go to her mother's motel room. Around 8:00 p.m., the appellant asked to borrow Hailey's Chevrolet Camaro so she could visit friends. Hailey left the appellant's motel room with her friends. Later that evening, she spoke with the appellant on the telephone, and she recalled nothing unusual about the appellant's speech.

Hailey admitted that she was confused as to whether the events occurred on Friday or Saturday, but she maintained that she had dinner with the appellant only once and that the appellant had been stopped while driving Hailey's Camaro.

At the conclusion of the proof, the jury found the appellant guilty of driving under the influence (DUI), and the trial court imposed a sentence of eleven months and twenty-nine days. On appeal, the appellant challenges her conviction.

II. Analysis

The appellant contends that the trial court erred by denying her motion for judgment of acquittal at the close of the State's proof.[3] The record reveals that following the denial of the motion, the appellant presented proof. Generally, a motion for a judgment of acquittal made at the

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[2] Some of the witnesses in this case share a surname. Therefore, for clarity, we have chosen to utilize their first names. We mean no disrespect to these individuals.

[3] The appellant repeatedly refers to the motion as a "motion for directed verdict." However, we note that Rule 29 of the Tennessee Rules of Criminal Procedure clearly provides that "[m]otions for directed verdict are abolished and are replaced by motions for judgment of acquittal." See also Finch v. State, 226 S.W.3d 307, 313 n. 3 (Tenn. 2007); State v. Price, 46 S.W.3d 785, 818 (Tenn. Crim. App. 2000).

conclusion of the State's proof is waived by an appellant when she chooses to present evidence on her behalf. State v. Thomas, 158 S.W.3d 361, 387 (Tenn. 2005) (appendix). The statement of the evidence before us does not reflect whether the appellant renewed the motion at the close of defense proof. However, the appellant argues in her brief that during the motion for new trial, she made an oral "Motion for Acquittal Notwithstanding the Verdict of the jury." We note that our supreme court has stated that "[a] motion for judgment notwithstanding the verdict is unknown to the rules and practice of criminal law" and that the desired result should be sought by a Rule 29 motion for judgment of acquittal. State v. Smith, 695 S.W.2d 527, 529 (Tenn. 1985); see also Tenn. R. Crim. P. 29. When a motion for judgment of acquittal is made following the close of the State's proof, "[t]he standard . . . is, in essence, the same standard which applies on appeal in determining the sufficiency of the evidence after a conviction." State v. Thompson, 88 S.W.3d 611, 614-15 (Tenn. Crim. App. 2000); see also State v. Thomas Edward Clardy, No. M2007-027729-CCA-R3-CD, 2009 WL 230245, at *11 (Tenn. Crim. App. at Nashville, Feb. 2, 2009), application for perm. to appeal filed, (Mar. 30, 2009). Thus, the issue before us is essentially one of evidentiary sufficiency.

Further, the appellant also contends that the trial court erred by failing to overturn the verdict while acting as thirteenth juror. We note that once a trial court has approved the verdict as the thirteenth juror, as it has in this case, our appellate review is then limited to determining the sufficiency of the evidence. See State v. Burlison, 868 S.W.2d 713, 719 (Tenn. Crim. App. 1993). Therefore, we will address the appellant's complaints as a challenge to the sufficiency of the evidence.

Regarding a challenge to the sufficiency to the evidence, on appeal, a jury conviction removes the presumption of the appellant's innocence and replaces it with one of guilt, so that the appellant carries the burden of demonstrating to this court why the evidence will not support the jury's findings. See State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The appellant must establish that no reasonable trier of fact could have found the essential elements of the offense beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); Tenn. R. App. P. 13(e).

Accordingly, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. See State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). In other words, questions concerning the credibility of witnesses and the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, and not the appellate courts. See State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990).

The appellant was found guilty of DUI. Tennessee Code Annotated section 55-10-401(a)(1) provides that it is unlawful for any person to drive or be in physical control of an automobile on any public road or highways or on any street or alley while under the influence of any intoxicant, marijuana, narcotic drug, or drug producing stimulating effects on the central nervous system. The proof at trial revealed that when Officer Rowney approached the appellant, she smelled of alcohol and had an open beer in the back of her vehicle. The appellant admitted to Officer Rowney that she

had been drinking the beer when she was stopped and that she had consumed a beer earlier in the evening. Officer Rowney testified that when the appellant exited her car, she had trouble with her balance and failed the field sobriety tests. Sergeant Bogusky testified that the appellant's speech was slurred and that she smelled of alcohol. He opined that the appellant was impaired.

On appeal, the appellant contends that Officer Rowney's testimony at the preliminary hearing regarding the lighting was inconsistent with his testimony at trial. The appellant argues that "[t]hese inconsistent statements under oath could only lead a reasonable trier of fact to believe that the [appellant] had participated in the [field sobriety tests] on the side of the interstate in the dark." At trial, Officer Rowney said that he did not recall testifying at the preliminary hearing that the lights on his patrol car were off at the time of the field sobriety tests. The jury was aware of any inconsistencies in Officer Rowney's testimony but, nevertheless, believed Officer Rowney's trial testimony. It was within the prerogative of the jury to make this factual determination. Accordingly, we conclude the evidence was sufficient to establish the appellant's guilt of driving under the influence.

III. Conclusion

Based upon the foregoing, we affirm the judgment of the trial court.

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NORMA McGEE OGLE, JUDGE